GEORGE PEDZISAI FICHANI
versus
DULLY HUNI
and
WELLINGTON MASEKO
and
PROVINCIAL MINING DIRECTOR
and
OFFICER COMMANDING BORDER CONTROL AND MINERALS UNIT
and
MUMS GOLD (PVT) LTD

HIGH COURT OF ZIMBABWE MANZUNZU J HARARE, 27 September 2018

Urgent application

T. Bare, for the applicant *B.T. Munjere*, for the 1st respondent *M. Machingura*, for the 2nd respondent *M. Gezera*, for the 3rd & 4th respondents

MANZUNZU J: This is a matter in which the applicant filed an application on urgency seeking the following relief in the form of a provisional order:

"TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms.

- 1. That the 1st and 2nd respondents be and are hereby barred either in themselves or through their agents from removing gold pregnant sands from Gazemba 105-108 mine pending the finalisation of Case No. HC 2666/18 (XRef HC 7729/17).
- 2. The respondents shall bear the costs of this application on the scale of legal practitioner and client jointly and severally the one paying the other to be absolved.

INTERIM RELIEF GRANTED

Pending the finalisation of this matter, the applicant is granted the following relief:-

1. The 1st and 2nd respondents be are hereby ordered and directed to fully account for all the leached sands and to facilitate the remittance of the gold produced by the leaching process to Fidelity Printers and Refiners (Pvt) Ltd where the same shall be held pending the

conclusion of the dispute between the parties, and doing so within twenty four (24) hours of this order being granted thereafter to desist from leaching any sands delivered from Gazemba 105-108 mines.

- 2. The 3rd and 4th respondents be and are hereby directed to:-
 - (i) Make sure that a correct and accurate record of all the sands removed from Gazemba 105-108 mine is produced by the 1st, 2nd and 3rd respondents.
 - (ii) Ensure that all gold recovered from the leaching of sands collected from Gazemba 105-108 mines is accounted for and remitted to Fidelity Printers and Refiners (Pvt) and a proper record kept pending finalisation of the dispute.
 - (iii) Supervise the return of all unleached and leached sands by the 1st and 2nd respondents from Mum's Gold Milling Plant to Gazemba 105-108 mines FORTHWITH.
- 3. The applicant's legal practitioners are authorised to serve this order upon the respondents."

After hearing counsels on the issue of urgency I handed down an *ex tempore* judgment and issued an order in the following terms:

"IT IS ORDERED THAT:

- 1. The matter is not urgent.
- 2. The matter is dismissed with costs."

The applicant has requested the written reason for this ruling. These are they:

There has been a number of litigation involving the applicant and the first respondent in both the High Court Harare and Bulawayo and the Magistrate's Court. Their source of dispute relate to a mine known as Gazemba 105-108 situate in Gokwe.

On 4 July 2009 the applicant and the first respondent entered into a mine swap agreement in which the applicant agreed to transfer gold blocks known as Gazemba 105-108 to the first respondent. The intention of these two parties was clearly captured in their joint letter of 16 May 2012 to the Mining Commissioner. I reproduce the contents of the letter hereunder.

"RE: MINE SWOOP AGREEMENT ENTERED AND SIGNED ON 4TH JULY 2009

We have agreed to transfer gold blocks from George Pedzisai Fichani to Dully Huni namely:

Gazemba 105 Reg No 25669 Gazemba 106 Reg No 25670 Gazemba 107 Reg No 26571 Gazemba 108 Reg No 25672

We have agreed to transfer 1x Nickel Block. Three (3) gold blocks from Mr Dully Huni to George Pedzisai Fichani namely:

Perseverance BM Reg 1039B Libra 39 Reg No. 5326 Railway 28 Reg No. <u>5013</u> Headley Reg No. <u>4484</u> (with pending issues)

It is not disputed that the mining claims Gazembe 105-108 are registered in the name of the first respondent. The applicant has been in course to dislodge the first respondent from ownership hence the several litigation. Despite the deep seated dispute between these two parties the first issue which the court had to deal with was whether the application was urgent. Parties who file application on urgency must always be alive to the duty to show that indeed the matter is urgent. The matter of urgency should never be assumed on the basis that the papers say the matter is urgent. The requirements for urgency must be met otherwise there will be no basis why an application must be treated with preference over several applications filed before it.

The respondents opposed this application firstly on the basis that the matter was not urgent. Mr *Bare* who appeared for the applicant was at pains in his attempt to convince the court that the matter was urgent.

One has to look at what are the requirements for urgency and what are the circumstances in this case which gives rise to urgency.

There are a number of cases which have come before this court which deal with the issue of urgency.

While previous decisions give guidelines each matter must be decided on its own merits. I am inclined to quote with approval the popular remarks of CHATIKOBO J (as he then was) (may his soul rest in peace) in the case of *Kuvarega* v *Registrar General & Another*, 1998 (1) ZLR 188 at p 193 where he had this to say;

"There is an allied problem of practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency... What constitutes urgency is not only imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arrives, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been a delay."

The fact that ownership of the mining claims Gazemba 105-108 were transferred to the first respondent is something which was known to the applicant as far back as 2017. Applicant had to be lawfully evicted from the location by the Messenger of Court Gokwe on 19 December

2017 following an Order by High Court Bulawayo on 2 August 2017. The applicant knew all along that first respondent had acquired mining rights over the claims. The present application was filed on 2 July 2018 because, according to the founding affidavit, the first and second respondents had started removing the sands some few days after the 21st June 2018. But was it not inevitable that such an act would occur given that it's part of the mining process. Why would applicant wait for the day of reckoning when he should have brought this application the moment he learnt that ownership had passed to the first respondent. There is no explanation why the application had to delay until 2 July 2018. The duty to act arose when applicant learnt of the transfer of ownership. Applicant did not act. He cannot jump the queue merely because he feels he is likely to suffer irreparable harm. For these reasons 1 dismissed the application as not urgent.

Murambasvina Legal Practice, applicant's legal practitioners Mazhande and Mazhande Legal Practice, 1st respondent's legal practitioners Kwenda & Chagwiza Attorneys, 2nd respondent's legal practitioners Civil Division, 3rd & 4th respondents' legal practitioners